American Bar Association
www.supremecourtpreview.org

Nos. 08-289 & 08-294

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, PETITIONER
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE, PETITIONERS
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTERESTS OF AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 9

ARGUMENT 10

THE NINTH CIRCUIT ERRED IN CONSIDERING ARIZONA'S FAILURE TO APPEAL THE DECLARATORY JUDGMENT AS A FACTOR WEIGHING AGAINST RELIEF UNDER RULE 60(B)(5) 10

A. Linking Rule 60(b)(5) Relief To A Public Defendant's Prior Litigation Tactics Inappropriately Extends The Lawmaking Authority Of Past Office Holders Beyond Its Constitutional Limits 10

B. Litigation Tactics of Past Administrations Should Be Given Minimal Weight Because State Office Holders Often Achieve Personal Political Objectives By Acquiescing 15

C. Arizona's Failure To Appeal The Declaratory Judgment Should Have Been Disregarded In Assessing Petitioners' Rule 60(b)(5) Motion 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Allen v. *McCurry*,
449 U.S. 90 (1980) 17

Benjamin v. *Malcolm*,
No. 75 Civ. 3077
(S.D.N.Y. filed Sept. 19, 1980) 16

Connecticut Mutual Life Insurance Co. v. *Spratley*,
172 U.S. 602 (1898) 11

Dunn v. *Carey*,
808 F.2d 555 (7th Cir. 1986) 16-17

Frew v. *Hawkins*,
540 U.S. 431 (2004) 12

Missouri v. *Jenkins*,
515 U.S. 70 (1995)
(Thomas, J., Concurring) 11

Newton v. *Commissioners*,
100 U.S. 548 (1879) 11

Ohio Life Insurance and Trust Co. v. *Debolt*,
57 U.S. (16 How.) 416 (1853) 10

Reichelderfer v. *Quinn*,
287 U.S. 315 (1932) 11

Rufo v. *Inmates of Suffolk County Jail*,
502 U.S. 367 (1992) 1-2, 5-7, 9, 20

Stone v. *Mississippi*,
101 U.S. 814 (1880) 11

U.S. Trust Co. v. *New Jersey*,
431 U.S. 1 (1977)
(Brennan, J., *dissenting*) 2

STATUTES AND RULES:

20 U.S.C. § 1703(f) 3

Fed. R. Civ. P. Rule 60(b)(5) 1-2, 5, 7-10, 15, 18-20

OTHER AUTHORITIES

1 William Blackstone, Commentaries 12

Robert E. Buckholz, et al., "The Remedial
Process in Institutional Reform Litigation,"
78 Colum. L. Rev. 784 (1978) 16

Frank H. Easterbrook, "Justice and Contract
in Consent Judgments",
1987 U. Chi. Legal F. 19 (1987) 14

Martin H. Redish, *Money Talks*
(New York Univ. Press) (2001) 13

Ross Sandler & David Schoenbrod,
*Democracy By Decree: What Happens When
Courts Run Government*
(Yale University Press) (2003) 16

Ross Sandler & David Schoenbrod,
"From Status to Contract and Back Again:
Consent Decrees in Institutional Reform
Litigation," 27 Rev. of Litig. (2007) 14

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

Rule 60(b)(5) expressly permits a district court to relieve a party from a judgment or decree where "applying it prospectively is no longer equitable." This Court held in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992) that requests for relief under Rule 60(b)(5) should be evaluated under a "flexible standard" and should be granted where a movant can show that "a significant change in facts or law warrants revision of the decree."

The decisions below misapplied Rule 60(b)(5) and *Rufo* in giving undue weight to the fact that prior State administrations had not appealed the earlier rulings supporting the decrees at issue. Specifically, the Ninth Circuit found that the State's failure to appeal a January 2000 declaratory judgment that its funding earmarked for English Language Learners (ELL) instruction was inadequate foreclosed any inquiry, in 2008, into whether the State's general increases in non-earmarked education funding since 2000 warranted revision of that judgment. Rather than considering whether Petitioners' proffered changed facts were sufficient to warrant modification under Rule 60(b)(5) and *Rufo*, the Ninth Circuit held that even *considering* those facts would "reopen matters made final when the Declaratory Judgment was not appealed." Pet. App. 68a. As a result, the Ninth

---

[1] The parties have consented to the filing of this brief. Letters of consent have been lodged with the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief.

Circuit's reliance on the State's failure to appeal earlier rulings as a factor weighing against modification deprived Arizona's current policy makers of the full opportunity for relief promised by Rule 60(b)(5) and *Rufo*.

This Court's ruling in *Rufo* struck a delicate balance between the interests of the federal judiciary in enforcing federal laws and the interests of State voters in enacting their own budgetary priorities. The Ninth Circuit's undue emphasis on missed appeal dates upsets that balance, and in this case inappropriately tilts the scale against the rights of Arizona's voters.

That outcome is of particular concern to the Washington Legal Foundation ("WLF"), a national nonprofit public interest law and policy center dedicated to, among other issues, opposing inappropriate intrusions by the federal judiciary into the operation of state governments. WLF strongly opposes the Ninth Circuit's attempt to tilt the scales against the duly enacted budgetary decisions of Arizona's voters. And it urges not only reversal of the decision below, but also clarification of the *Rufo* standard so that "each generation of representatives can and will remain responsive to the needs and desires of those whom they represent." *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., *dissenting*).

STATEMENT

This case was originally filed in 1992. The plaintiffs, parents of ELL children in Nogales, Arizona, alleged that the State of Arizona had failed to "take appropriate action to overcome language barriers that impede equal participation" of their children in Arizona's instructional programs, in violation of the fed-

eral Equal Education Opportunity Act of 1974 (EEOA), 20 U.S.C. § 1703(f).

The plaintiffs alleged numerous specific defects in Arizona's ELL education programs, and the State eventually agreed to (and did) remedy most of them. Agreement was not reached on the question of whether Arizona adequately funded the ELL programs in plaintiffs' school district, and a bench trial was held on that subject in August 1999.

Following that trial, on January 24, 2000, the district court issued a declaratory judgment finding numerous deficiencies in the ELL program in plaintiffs' district, including:

> 1) too many students in a class room,
>
> 2) not enough class rooms,
>
> 3) not enough qualified teachers, including English as a Second Language ("ESL") teachers and bilingual teachers to teach content area studies,
>
> 4) not enough teacher aids,
>
> 5) an inadequate tutoring program, and
>
> 6) insufficient teaching materials for both ESL classes and content area courses.

Pet. App. 149a-150a.

The district court attributed these defects to inadequate funding. The court noted that the programs at issue were "financed by a combination of revenues from local, county, state and federal sources," including (1) the State's "base level" funding per student (the amount paid by the State for every student in the State, regardless of language skills); (2) the State's "Group B" funding per student (the amount paid by the State in addition to base level funding for

certain specific types of student, including for ELL students); (3) federal grants; (4) regular district and county taxes; and (5) special voter-approved district and county taxes called "overrides." Pet. App. 121a-146a.

While significant increases in any of these five sources of revenue would undoubtedly alleviate the above deficiencies, the district court focused only on the second – Arizona's incremental "Group B" funding per ELL student – because the federal law at issue, the EEOA, only addressed the *State's* obligations to "take appropriate action to overcome language barriers." The district court concluded that the State's Group B funding was inadequate to satisfy its obligations under the EEOA. Pet. App. 150a.

The State, represented at the time by Attorney General Janet Napolitano, did not appeal the Declaratory Judgment.

Following the declaratory judgment, *all* of the numerous sources of funding for ELL education identified by the district court were increased. Some of that increase was the result of the federal No Child Left Behind Act, which included an entire title on ELL education and provided additional funds for it. The voters in plaintiffs' district approved overrides adding additional funds. And the State substantially increased both its base level funding and its Group B funding. The net result of those increases was that the total spending from all sources per ELL student rose from $3,302 in 2000 to $4,605 in 2007 – a 39% increase.

One of those spending increases came in the form of a State law called HB 2064, which provided for increased Group B funding as well as two additional

supplemental state-wide funds for "structured English immersion" and for "compensatory instruction" which school districts could access in certain circumstances.

Governor Janet Napolitano thought HB 2064 did not go far enough to improve Arizona's ELL programs. She nevertheless allowed the bill to become law because she thought her agenda would fare better in a courthouse than it was faring in the statehouse: "After nine months of meetings and three vetoes, it is time to take this matter to a federal judge." The Governor issued a statement to accompany the bill, saying she believed that it: (1) set an arbitrary level of ELL funding; (2) failed to ensure academic accountability; (3) failed to ensure program effectiveness; (4) created new bureaucracy and excess paperwork; and (5) violated federal laws. Pet. App. 27a-28a.

The Governor then directed the Attorney General to move the district court, on behalf of the State, for expedited consideration of the law. The principal defendant in the case, the State of Arizona, was thus pushing for the *continuation* of the declaratory judgment requiring additional ELL funding. It was left to the State schools superintendent and the Legislature's majority leaders, the Petitioners here, to intervene to oppose continued federal court involvement, which they did in the form of a motion for relief from judgment under Rule 60(b)(5).

Citing *Rufo*, the Petitioners urged that significant changes in both facts and law warranted revision of the district court's earlier rulings commanding increased Group B funding. Specifically, the Petitioners pointed to significant increases in overall school

funding, improved management, and improved test scores as proof that Arizona was now taking "appropriate action to overcome language barriers" as required by the EEOA. The Petitioners did *not* argue that they had complied with the earlier orders specifically directing increased Group B funding, but rather argued that the conditions those earlier orders were intended to rectify had been remedied through other means, so that the continuation of those orders was no longer equitable.[2]

In January 2007, the district court held an evidentiary hearing to evaluate the current conditions on the ground. Despite the Petitioners making clear that they were seeking modification based on changed facts and not a finding of compliance, the district court considered only whether the State had complied with the earlier injunctions requiring increased Group B funding. The district court did not consider whether the earlier injunctions should be modified based on a significant change in fact or law under *Rufo*. Pet. App. 111a. The district court found that its earlier injunctions had not been satisfied and renewed its command to satisfy those earlier decrees by the end of the current legislative session.

On appeal, the Ninth Circuit acknowledged that Arizona had "significantly improved its ELL infrastructure." The court noted that the State had (1) increased overall school funding; (2) improved and standardized its ELL training and proficiency stan-

---

[2] The Petitioners also pointed out that the law had changed, in that the ELL funding mandates specified by Congress in the No Child Left Behind Act of 2001 had supplanted the EEOA's more general funding requirements. While *amicus* also supports those arguments, they are not the subject of this brief.

dards; (3) ensured that all teachers, supervisors, principals and superintendents are ELL certified, and in plaintiffs' district; (4) reduced class sizes; (5) improved teacher quality; (6) made teaching materials more available; (7) increased performance monitoring; and, most important,(8) helped graduates of the ELL program to perform as well as their native English speaking peers. Pet. App. 30a-41a. The Ninth Circuit noted that these improvements were made possible by the 39% increase in the total spending from all sources for each ELL student in plaintiffs' district discussed above. Pet. App. 44a.

But the Ninth Circuit refused to find any of these improvements to be "changed facts" sufficient to justify relief from the earlier orders under Rule 60(b)(5) and *Rufo*, because the Group B funding component of the 39% total spending increase had only increased from $156 to $444 per student. The Ninth Circuit concluded that the modest increase in this subcategory was evidence that the State was poaching funds from non-ELL students in order to meet its obligations to ELL students. The Ninth Circuit wrote that the declaratory judgment had specifically disapproved of such poaching, and that the Petitioners, having failed to appeal that particular ruling in 2000, could not revisit that ruling now. Pet. App. 66a-70a.

> If the [Petitioners] believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they should have appealed the Declaratory Judgment. They may not now up-end its basic legal conclusions.

Pet. App. 69a.

The Ninth Circuit emphasized throughout its opinion that even *considering* the issues raised by the Petitioners in their Rule 60(b)(5) motion would mean reopening issues that could not be reopened because they were not timely appealed. *See, e.g.,* Pet. App. 59a ("This case is unusual in that the [Petitioners] (1) *did not appeal* from the original judgment holding that Arizona's funding system for ELL programs was in violation of the EEOC; [and] (2) *did not appeal* from the injunctions issued to remedy that violation") (emphasis added); Pet. App. 60a ("nor do we think it proper to reward Arizona's foot-dragging by granting relief from judgment on grounds that *could have been raised on appeal* from the Declaratory Judgment and from earlier injunctive orders but were not") (emphasis added); Pet. App. 62a ("The judgment determined that the state has not provided adequate resources to support [Nogales Unified School District's (") NUSD's[")] ELL programming, as required by the EEOA. We cannot now decide anew the *unappealed* Declaratory Judgment, nor the many post-judgment orders so holding. As we have explained, the provisions of Rule 60(b) may not be applied to 'derogate from the purpose and effect of Rule 4(a).' *In re Stein*, 197 F.3d at 425. The legal determinations made in the Declaratory Judgment were *unappealed* and are now final") (emphasis added); Pet. App. 68a (By arguing that focusing on earmarked funding is no longer appropriate due to general increases in non-earmarked funding, "the Superintendent and Legislative Intervenors seek to reopen matters made final when the Declaratory Judgment was *not appealed*") (emphasis added); Pet. App. 69a ("If the [Petitioners] believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they *should have appealed* the Declaratory

Judgment. They may not now up-end its basic legal conclusions") (emphasis added); Pet. App. 70a (The district court in 2000 refused to view forcing school districts to dip into base level funds to fund ELL programs as an option. "That binding legal determination is *not now subject to reconsideration*") (emphasis added); Pet. App. 70a ("The district court understood EEOA compliance to be a state obligation and so ruled. * * * That *unappealed* determination still stands") (emphasis added).

By deeming Arizona's failure to appeal the declaratory judgment as a significant – indeed determinative – factor weighing against relief under Rule 60(b)(5), the Ninth Circuit departed from the framework set forth by this Court in *Rufo*. As explained below, this change, if followed nationally, would cripple efforts by future policy makers to find new ways to improve upon the policy decisions of their predecessors, and would thus mark a sea change in the permanence of federal judicial interference in state political processes. It should therefore be reversed.

SUMMARY OF ARGUMENT

The Ninth Circuit's emphasis on Arizona's failure to appeal the declaratory judgment as a factor weighing against relief from that ruling is a dangerous precedent for two related reasons. First, *any* reference to the litigation tactics of previous office holders has the effect of extending the budgetary authority of prior office holders beyond its temporal limits. Second, as exemplified by Governor Napolitano's role here, State officials often *benefit* from institutional reform injunctions requiring their States to divert funding to programs they support, so the assumption that the State's voters were zealously represented

when prior litigation tactics were formulated – and thus already had their chance to make all meritorious arguments against the injunction – is flawed.

It was therefore error for the Ninth Circuit to refuse to consider all of the changed facts proffered by Petitioners, without regard to whether they required revisiting the district court's earlier conclusions. The Ninth Circuit's improper focus on the State's failure to advance Petitioners' arguments sooner had the effect of entrenching the power of prior office holders whose views are not shared by Arizona's voters.

ARGUMENT

THE NINTH CIRCUIT ERRED IN CONSIDERING ARIZONA'S FAILURE TO APPEAL THE DECLARATORY JUDGMENT AS A FACTOR WEIGHING AGAINST RELIEF UNDER RULE 60(B)(5)

A. Linking Rule 60(b)(5) Relief To A Public Defendant's Prior Litigation Tactics Inappropriately Extends The Lawmaking Authority Of Past Office Holders Beyond Its Constitutional Limits

1. This Court has repeatedly held that sitting lawmakers cannot bind their successors. In *Ohio Life Insurance and Trust Co.* v. *Debolt*, 57 U.S. (16 How.) 416, 431 (1853), this Court wrote:

> The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, …; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.

Similarly, in *Newton* v. *Commissioners*, 100 U.S. 548 (1879), the Court ruled that the Ohio legislature could move its state capital, notwithstanding decisions by a legislature thirty years earlier as to its location. The Court emphatically declared:

> Every succeeding legislature possesses the same jurisdiction and power ... as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. … It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require.

Id. at 559.

The Court has expressed a similar view in many other cases, *E.g., Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880) ("no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police"); *Connecticut Mutual Life Insurance Co*. v. *Spratley*, 172 U.S. 602, 621 (1899) ("[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act."); *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 f(1932) ("the will of a particular Congress which does not impose itself upon those to follow in succeeding years.")

More recently, the Court and its individual Members have applied this principle in the litigation context. In *Missouri* v. *Jenkins*, 515 U.S. 70, 131 (1995), for example, Justice Thomas noted that "[a] structural reform decree eviscerates a State's discretionary authority over its own program and budgets and

forces state officials to reallocate state resources and funds * * * at the expense of other citizens, other government programs, and other institutions not represented in court." (Thomas, J., concurring). And in *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004), the Court noted that "remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers".

The foundation of these holdings is the principle expressed long ago by Blackstone:

> Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.

1 William Blackstone, Commentaries 90.

This principle of equality of power from one generation to the next was woven into the text of the Constitution itself. Numerous provisions address this issue, including:

> (1) presidential term limits (U.S. Const. amend. XXII), which enshrines the principle of temporary power;
>
> (2) the guarantee of the power to amend the Constitution (U.S. Const. art. V), which shows the Framers' recognition that future generations could improve upon their work;
>
> (3) the First Amendment's protection of free speech (U.S. Const. amend I), which ensures

that the next generation of political ideas is given a full and fair opportunity to supplant its predecessors, and that no particular viewpoint is entrenched as more normatively "correct" than another. *See* Martin H. Redish, *Money Talks* 48 (New York Univ. Press) (2001) (discussing the principle of "epistemological humility" that underlies the entire concept of free speech protection, and noting that "free speech protection cannot be made to turn on either the regulator's or the judicial reviewer's agreement with the normative positions being expressed, lest free speech protection degenerate into an ideological tool to be used by those in power to suppress those who are not"); and

(4) the rare and selective use of supermajority voting (U.S. Const. art. I, § 3, cl. 6 (Senate's guilty verdict on impeachments); U.S. Const. art. I, § 5, cl. 2 (the expulsion of a member from either house); U.S. Const. art. I, § 7 (both houses overriding a presidential veto); U.S. Const. art. II, § 2, cl. 2 (Senate's ratification of a treaty); U.S. Const. art. V (both houses proposing a constitutional amendment); U.S. Const. amend. XIV, § 3 (to remove disability from congressional service of those who participated in insurrection); U.S. Const. amend. XXV, § 4 (determination of presidential disability)), which implies that all other acts of Congress are to be passed by simple majority vote, enabling their repeal by simple majority vote as well.

Each of these provisions makes clear the founders' commitment to keeping the channels of political in-

novation clear of any interference from past office holders.

2. If one administration or legislative session cannot bind the next by its legislative acts, there is no reason why they should be able to do the same by acquiescing – either by consent or by failure to appeal – to a judicial decree. As Judge Easterbrook observed in the context of consent decrees:

> Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination when embedding it in C.F.R. does not.

Frank H. Easterbrook, "Justice and Contract in Consent Judgments", 1987 U. Chi. Legal F. 19, 40 (1987).

The same reasoning applies equally to a State's failure to appeal or failure to raise certain arguments in the course of a lawsuit. If an office holder in charge of the State's litigation strategy decides to forego a certain argument – either because she feels it was without merit or, as discussed in the next section, for other reasons – that litigation decision should be no more binding upon successor administrations than would the same office holder's legislative or regulatory efforts. An office holder does not get a "boost" in her lawmaking powers by virtue of getting sued. To preserve the principle of equality between yesterday's leaders and today's, the litigation decisions of the former must not estop the latter from taking contrary views.[3]

---

[3] The appropriate doctrinal category for analyzing the judicial management of institutional reform decrees is the law of equitable remedies, not the law of contract. See discussion of the dis-

This is not to suggest that future administrations may simply ignore binding judicial decrees entered against their predecessors. But where, as here, a decree is premised upon the acquiescence of a predecessor administration, and a successor moves for relief from that decree under Rule 60(b)(5), the acquiescence of the predecessor administration to the decree should not be used as an independent basis for denying relief.

B. Litigation Tactics of Past Administrations Should Be Given Minimal Weight Because State Office Holders Often Achieve Personal Political Objectives By Acquiescing

That general principle finds powerful support in more practical concerns. For one thing, institutional reform injunctions – judicial decrees mandating the funding of government institutions – insulate the institutions they cover from being forced to compete for limited public dollars with other spending programs. And they allow the office holders favoring the covered institutions to bypass the often unsuccessful and always painstakingly slow process of legislative compromise with other elected officials seeking to use the same funds for their own competing priorities.

A court order mandating funding of a particular institution is thus a big "win" for the office holders supporting it – they get the results they wanted without the customary effort and delay and without having to give up anything in return to their political

---

tinction and the implications of that distinction in Sandler & Schoenbrod, "From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation," 27 *Rev. of Litig.* 115 (2007).

adversaries. They can portray themselves as having accomplished what they promised without getting bogged down in legislative gridlock, and can leverage that success to win higher office, leaving to successor officials the problem of budget shortfalls in competing programs. See Ross Sandler and David Schoenbrod, *Democracy By Decree: What Happens When Courts Run Government* (Yale University Press) (2003), at 169-70.

This strong potential for conflicts of interest in formulating litigation tactics has not gone unnoticed in the lower courts. In *Benjamin* v. *Malcolm*, No. 75 Civ. 3077 (S.D.N.Y. filed Sept. 19, 1980), a long-running suit in the federal district court against New York City and its Department of Corrections seeking improvement of substandard conditions in the city jails, a defendant prison official openly advocated at trial the increased funding sought by the plaintiffs but opposed by the City, his co-defendant. In response to what he viewed as the absurdity of the resulting examination by the City's lawyer of his own client, the trial judge observed, as follows:

> Sometimes I really wonder . . . whether the defendants themselves shouldn't be represented by separate counsel, about whether there is a conflict of interest between the Commissioner of Corrections, for example, and the Mayor of the City, and I don't know in this particular line of questioning who you represent.

Quoted in Robert E. Buckholz, et al., "The Remedial Process in Institutional Reform Litigation," 78 Colum. L. Rev. 784, 904 n.199 (1978).

A similar situation was presented in *Dunn* v. *Carey*, 808 F.2d 555 (7th Cir. 1986), in which county

jail inmates in Muncie, Indiana had sued county officials for providing allegedly inadequate jail facilities. The officials capitulated and signed a consent decree by which they promised to construct a new jail, police and city hall complex, to be financed through new taxes. The Seventh Circuit sustained a collateral challenge to the decree:

> A court must be alert to the possibility that the consent decree is a ploy in some other struggle. Perhaps the defendants have been frustrated by their inability to win political approval for the construction of a new city hall for Muncie. The federal litigation may have offered an opportunity to achieve other goals, and the "consent" to build a whole governmental complex may have been what defendants received in exchange for giving plaintiffs what they wanted.

Id. at 560.

These cases illustrate that the assumptions that justify the application of estoppel rules to bind a *private* litigant to his prior litigation positions – that the litigant already had his day in court – may not be present when a *public* litigant is involved. When a State office holder is given the chance to "defend" a case in which he can win his personal political objectives by losing the case, and he fails to mount a complete defense, it cannot truthfully be said that the State he represents had a "full and fair opportunity" to litigate the issues he conceded. In these circumstances, estoppel should not apply. *See Allen* v. *McCurry*, 449 U.S. 90, 95 (1980) ("estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case").

This is not to suggest that an office holder who supports an injunction against her polity is necessarily disloyal to her constituents or self-dealing. She may think that she is serving their best interests and is using every tool at her disposal to accomplish what she promised on election day. The point is that she has a strong incentive to forego arguments that a successor with different political views may think are important. The principle, discussed above, of equality among generations of office holders dictates that the successor should be given an opportunity to make the arguments her predecessor chose to forego.

C. Arizona's Failure To Appeal The Declaratory Judgment Should Have Been Disregarded In Assessing Petitioners' Rule 60(b)(5) Motion

These considerations strongly support the conclusion that Arizona's previous failure to appeal the declaratory judgment should have been disregarded in assessing Petitioner's Rule 60 motion, and that the Ninth Circuit's contrary conclusion improperly elevates the litigation tactics of bygone office holders over the decisions of Arizona's current voters.

As previously noted, in the 2000 declaratory judgment and in subsequent enforcement orders, the district court directed the State to provide sufficient Group B funding to bring its ELL program into compliance with the EEOA. The State did not provide the Group B funding the district court wanted, but, seven years later, Petitioners nevertheless sought modification of the Declaratory Judgment under Rule 60(b)(5) on the grounds that the State's ELL program had come into compliance with the EEOA through substantial increases in numerous non-Group B

sources of ELL funding. The Ninth Circuit acknowledged the improvements in the quality of the ELL program as well as the substantial increases in non-Group B funding, but refused to even consider Petitioners' argument that non-Group B sources of funding could satisfy the EEOA, on the grounds that the State had missed its chance to raise that defense by not appealing the declaratory judgment.

In so ruling, the Ninth Circuit entrenched the authority of the Attorney General who in 2000 conceded that only more Group B funding could cure the EEOA violations. That Attorney General, Janet Napolitano, was then elected Governor, and publicly admitted as part of the record in this case that (1) despite representing the State (the principal defendant in this case), she supports the plaintiffs' position that more Group B funding is needed (a conflict of interest which necessitated Petitioners' intervention so that *somebody* in this case would be representing the majority of Arizona's voters); and (2) she prefers resolving this fiscal funding dispute in federal court rather than at the State Capitol ("After nine months of meetings and three vetoes, it is time to take this matter to a federal judge"). Pet. App. 26a.

Entrenching the agenda of a former office holder is thus more than just a theoretical risk in this case; it is an uncontested fact. Governor Napolitano freely admitted that she supports the very declaratory judgment that she was supposed to be zealously opposing, and she further admits that she is seeking to use that declaratory judgment as a trump card to win a budget battle that she has been unable to win through regular legislative channels.

Yet the Ninth Circuit gave Governor Napolitano exactly what she wanted. And it did so by using *Attorney General* Napolitano's failure to appeal the Declaratory Judgment as a factor weighing in favor of *Governor* Napolitano's effort to override the political process.

That was contrary to controlling law. The Rule 60(b)(5) standard set forth by this Court in *Rufo* does not permit consideration of anything more than whether "a significant change in facts or law warrants revision of the decree." 502 U.S. at 393. The Ninth Circuit's refusal to entertain arguments it deemed waived by a former Attorney General not only departed from *Rufo*, but did so in a manner that entrenched the authority of a former Attorney General who has publicly admitted holding views that diverge from those of the voters she supposedly represents—and on the precise issue on which relief is sought.

CONCLUSION

The Ninth Circuit's decision in this case should be reversed and remanded with instructions for the district court to fully consider all changed facts proffered by Petitioners, including the question the Ninth Circuit wrongly deemed waived: whether Arizona's ELL program was sufficiently improved by means of increased non-Group B funding to render prior decrees requiring more Group B funding no longer equitable.

Respectfully submitted.

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

FEBRUARY 2009